

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 09-1547 CW

CARLOS RADCLIFFE,

Plaintiff,

v.

ROBERT L. AYERS, JR., in his official
capacity; and CORRECTIONAL OFFICER
MARINO, individually,

Defendants.

ORDER GRANTING
DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT
(Docket No. 8)

Defendants Robert L. Ayers, Jr. and Correctional Officer
Marino move for summary judgment as a matter of law on Plaintiff
Carlos Radcliffe's claims under 42 U.S.C. § 1983. Plaintiff
opposes their motion. The motion was taken under submission on the
papers. Having considered all the papers submitted by the parties,
the Court GRANTS Defendants' motion (Docket No. 8).

BACKGROUND

This civil rights action arises out of Plaintiff's allegations
of sexual harassment during his incarceration at California State
Prison-San Quentin. Plaintiff states that, when he attempted to
send mail on March 9, 2008, Defendant Marino made sexually
suggestive comments and lewd gestures toward him. He believes that

1 Defendant Marino made these comments and gestures because he knew
2 that they "would be particularly offensive to a Hispanic male like
3 me." Radcliffe Decl. ¶ 2. Plaintiff filed an inmate appeal
4 against Defendant Marino, which he claims was later "destroyed."
5 Id. ¶ 4.

6 Because of this incident, Plaintiff states that he "felt
7 extremely intimidated and threatened" by Defendant Marino and
8 "feared retaliation by him." Id. ¶ 3. He states that he suffered
9 "fear, terror, severe emotional distress, anxiety, humiliation, and
10 embarrassment" and, as a result, sought and received mental health
11 treatment. Id. ¶ 4. Also, Plaintiff asserts that, for two months,
12 he would "miss meals every day Officer Marino worked." Id. ¶ 5.

13 Plaintiff states that, on March 25, 2008, he asked to be
14 placed in the prison's administrative segregation unit (ASU) in
15 order to avoid Defendant Marino; Defendants admit that he was moved
16 to the ASU on May 1, 2008 because of his "self-proclaimed safety
17 concerns." Id. ¶ 6; Defs.' Answer ¶ 17. Despite first stating
18 that he asked to be moved to the ASU, Plaintiff later states that
19 the May 1 move was "against my will." Radcliffe Decl. ¶ 8.
20 However, he presents no evidence that he withdrew his initial
21 request to be moved to the ASU. Plaintiff states that, while
22 housed in the ASU, he was denied his exercise time.

23 Plaintiff asserts claims against Defendants Marino and Ayers
24 under 42 U.S.C. § 1983 for allegedly violating his rights under the
25 Eighth and Fourteenth Amendments of the United States Constitution.
26 Plaintiff sues Defendant Ayers in his official capacity and alleges
27 that, during the relevant period, he was responsible for the
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1 administration of the prison.

2 LEGAL STANDARD

3 Summary judgment is properly granted when no genuine and
4 disputed issues of material fact remain, and when, viewing the
5 evidence most favorably to the non-moving party, the movant is
6 clearly entitled to prevail as a matter of law. Fed. R. Civ.
7 P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
8 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
9 1987).

10 The moving party bears the burden of showing that there is no
11 material factual dispute. Therefore, the court must regard as true
12 the opposing party's evidence, if supported by affidavits or other
13 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
14 F.2d at 1289. The court must draw all reasonable inferences in
15 favor of the party against whom summary judgment is sought.
16 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
17 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
18 1551, 1558 (9th Cir. 1991).

19 DISCUSSION

20 I. Claims Against Defendant Marino

21 A. Eighth Amendment Claims

22 The treatment a prisoner receives in prison and the conditions
23 under which he is confined are subject to scrutiny under the Eighth
24 Amendment. See Helling v. McKinney, 509 U.S. 25, 31 (1993). The
25 Eighth Amendment imposes duties on prison officials, who must
26 provide all prisoners with the basic necessities of life such as
27 food, clothing, shelter, sanitation, medical care and personal
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1 safety. See Farmer v. Brennan, 511 U.S. 825, 832 (1994); DeShaney
2 v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200
3 (1989); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982).

4 A prison official violates the Eighth Amendment when two
5 requirements are met: (1) the deprivation alleged must be,
6 objectively, sufficiently serious, see Farmer, 511 U.S. at 834
7 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)), and (2) the
8 prison official must possess a sufficiently culpable state of mind,
9 see id. (citing Wilson, 501 U.S. at 297).

10 Plaintiff argues that he was deprived of food and exercise.
11 However, he does not plead facts nor offer evidence that Defendant
12 Marino, with a culpable state of mind, deprived him of either. As
13 noted above, Plaintiff states that he refused meals because he did
14 not want to encounter Defendant Marino. With respect to exercise
15 time, he states that he "was denied [his] daily allocation of
16 exercise time" during his time in administrative segregation,
17 Radcliffe Decl. ¶ 8; however, Plaintiff states that he asked to be
18 placed in administrative segregation, id. ¶ 6. Plaintiff neither
19 pleads facts nor offers evidence from which a jury could infer that
20 Defendant Marino acted with the intent to deprive him of food or
21 exercise. His inability to receive food appears to be the product
22 of his own decisions; he cannot create an Eighth Amendment
23 violation by depriving himself of amenities offered by prison
24 officials. And with regard to exercise, Plaintiff does not proffer
25 evidence that suggests that prison officials unlawfully denied him
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1 this right.¹

2 Further, Defendant Marino's alleged conduct, although
3 offensive, does not constitute an Eighth Amendment violation.
4 Verbal sexual harassment is generally not actionable under the
5 Eighth Amendment. Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir.
6 2004) ("[T]he Eighth Amendment's protections do not necessarily
7 extend to mere verbal sexual harassment."). In Austin, the Ninth
8 Circuit held that a thirty-to-forty-second incident in which a
9 prison guard exposed himself in front of and made lewd comments to
10 a prisoner was "not sufficiently serious to constitute an Eighth
11 Amendment violation." 367 F.3d at 1172. Here, Defendant Marino's
12 gestures and comments were no worse than those before the court in
13 Austin.

14 Accordingly, the Court grants summary judgment in favor of
15 Defendant Marino on Plaintiff's section 1983 claim based on the
16 Eighth Amendment.

17 B. Fourteenth Amendment Equal Protection Claims

18 "The Equal Protection Clause of the Fourteenth Amendment
19 commands that no State shall 'deny to any person within its
20 jurisdiction the equal protection of the laws,' which is
21 essentially a direction that all persons similarly situated should
22 be treated alike." City of Cleburne v. Cleburne Living Center, 473
23 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216
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25
26 ¹ To the extent Plaintiff complains that he was unlawfully
27 deprived of exercise while in the ASU for reasons unconnected to
28 Defendant Marino's alleged harassment, Defendant Marino cannot be
held liable. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.
1989) (requiring personal participation by a defendant for
liability under § 1983).

1 (1982)).

2 To state a claim for relief under the Equal Protection Clause,
3 a plaintiff "must plead intentional unlawful discrimination or
4 allege facts that are at least susceptible of an inference of
5 discriminatory intent.'" Byrd v. Maricopa County Sheriff's Dep't,
6 565 F.3d 1205, 1212 (9th Cir. 2009) (quoting Monteiro v. Tempe
7 Union High Sch. Dist., 158 F.3d 1022, 1026 (9th Cir. 1998)). To
8 defeat a motion for summary judgment, a plaintiff "must produce
9 evidence sufficient to permit a reasonable trier of fact to find by
10 a preponderance of the evidence that the decision was racially
11 motivated.'" Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir.
12 2003) (quoting Bingham v. City of Manhattan Beach, 329 F.3d 723,
13 732 (9th Cir. 2003)).

14 Plaintiff argues that Defendant Marino violated his equal
15 protection rights under the Fourteenth Amendment because Defendant
16 Marino knew that his gestures and comments "would be particularly
17 offensive to a Hispanic male." Radcliffe Decl. ¶ 2. However,
18 Plaintiff offers no competent evidence to support this assertion.²
19 Plaintiff's own belief is not sufficient to show that Defendant
20 Marino's actions were racially motivated.

21 Because Plaintiff has not established a genuine issue of
22 material fact on whether Defendant Marino harassed him because of
23 his membership in a protected group, the Court grants summary
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26 ² Plaintiff complains that Defendants' motion is premature in
27 that he has not had sufficient time to conduct discovery. However,
28 Plaintiff has not made the showing necessary, under Federal Rule of
Civil Procedure 56(f), to warrant additional time to conduct
discovery to oppose Defendants' motion.

1 judgment in favor of Defendant Marino on Plaintiff's section 1983
2 claim based on the Fourteenth Amendment.

3 II. Claims Against Defendant Ayers

4 Plaintiff asserts his claims against Defendant Ayers under a
5 respondeat superior theory of liability. However, there "is no
6 respondeat superior liability under section 1983." Taylor, 880
7 F.2d at 1045; see also Jones v. Williams, 297 F.3d 930, 934 (9th
8 Cir. 2002). "Liability under section 1983 arises only upon a
9 showing of personal participation by the defendant. A supervisor
10 is only liable for constitutional violations of his subordinates if
11 the supervisor participated in or directed the violations, or knew
12 of the violations and failed to act to prevent them." Taylor, 297
13 F.3d at 1045. Plaintiff offers no evidence that Defendant Ayers
14 personally participated in Defendant Marino's conduct or that he
15 knew of the conduct and failed to prevent it. And even if the
16 record contained such evidence, as noted above, the challenged
17 conduct does not violate Plaintiff's constitutional rights.

18 Further, assuming Plaintiff had viable claims against
19 Defendant Ayers, he could not seek monetary damages against him.
20 Plaintiff sued Defendant Ayers in his official capacity. Compl.
21 ¶ 5. "State officers in their official capacities, like States
22 themselves, are not amenable to suit for damages under § 1983."
23 Arizonans for Official English v. Arizona, 520 U.S. 43, 69 n.24
24 (1997).

25 Accordingly, the Court grants summary judgment in favor of
26 Defendant Ayers on all of Plaintiff's claims.
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CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants Marino and Ayers's Motion for Summary Judgment (Docket No. 8). The Clerk shall enter judgment and close the file. Each party shall bear his own costs.

IT IS SO ORDERED.

Dated: April 7, 2010



CLAUDIA WILKEN
United States District Judge